92-1246

JAN 15 1993
OFFICE OF THE CLERK

NO._____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1992

SALLIE ELIZABETH JONSTON-TAYLOR,Individually and as Administratrix of the Estate of EDWARD TAYLOR; DAVID ARGANIAN, LILLIAN ARGANIAN, Individually,

Petitioners

vs.

PHILIP J. GANNON, Individually and as President of LANSING COMMUNITY COLLEGE; BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE, Jointly and Severally,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX I (pages 1-82)

Joseph A. Warren
1016 N. Washington
Lansing, MI 48906
(517) 372-2444
Attorney For Petitioners

Charles Noble
26316 Telegraph Rd
P.O. Box 697
Flat Rock, MI 48134

TABLE OF CONTENTS

Page

Order Denying Petition For Rehearing.....1-a

Johnston-Taylor, Et. Al., v Gannon, Et. Al.,
(Sixth Circuit).....2-a

Johnston-Taylor, Et. Al., v Gannon, Et. Al.,
(Sixth Circuit).....11-a

Johnston-Taylor, Et. Al., v Gannon, Et. Al.,
(W.D. Mich, Hon. Robert Holmes Bell).....24-a

Johnston-Taylor, Et. Al., v. Gannon, Et. Al.,
(W.D. Mich, Hon. Robert Holmes Bell).....49-a

No. 91-2398

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SALLIE ELIZABETH-TAYLOR, ETC.,ET AL.,
Plaintiffs-Appellants,

v. **ORDER**

PHILIP J. GANNON, ETC., ET AL.,
Defendants-Appellees.

BEFORE: MARTIN and JONES, Circuit Judges: and FEIKENS,[1] Senior United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/_____

Leonard Green, Clerk

Filed October 20, 1992

---

[1]. The Honorable John Feikens, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

NO. 91-2398
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHNSTON-TAYLOR, ET AL.,
Plaintiffs-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

v.

GANNON, ET AL.,
Defendants-Appellees
_____/

BEFORE: MARTIN and JONES, Circuit Judges; and FEIKENS, Senior District Judge.[2]

PER CURIAM. Following the first appeal of this case, *Johnston-Taylor v. Gannon*, 907 F.2d 1577 (6th Cir. 1990), we remanded for further proceedings to determine the merits of plaintiffs' substantive and procedural due process claims. On remand, the district court reaffirmed its grant of summary judgment to the defendants.

---

[2] The Honorable John Feikens, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

For the following reasons, we affirm.

In our earlier opinion we determined that David Arganian and the Estate of Professor Edward Taylor had a property interest in continued employment with the university. Both Arganian and Taylor were faculty members at Lansing Community College and their permanent full-time employment was terminated in 1983 due to the alleged existence of a financial exigency at the college. We found that professors with tenure or with a continuing contract may not be discharged without receiving a hearing in which they are informed of the grounds for their dismissal and given the opportunity to challenge the sufficiency of those grounds. 907 F.2d at 1581 (citing *Whitsel v. Southeast Local District*, 44 F.2d 1222, 1228 (6th Cir. 1973)). Because the original record was unclear as to the process the two professors received at their termination, as well as to the substantive nature of the alleged financial exigency, we issued a narrow opinion remanding this matter to the district court to develop the record further.

On remand, the district court held a three-day evidentiary hearing on the issues of procedural and substantive due process. With regard to the procedural due process afforded the two men, the court made several findings. The court found that Arganian and Taylor, as well as other faculty members, were sent written notification on

July 22, 1983, advising them that their employment would be terminated in forty-five days because of a reduction in staff. For the purposes of the procedural due process analysis, the court found that the actual date of termination was September 6, 1983. This was the date, forty-five days after the July 22 letter, on which the terminations were to become effective. Within a week of receiving the notification letter, Arganian met twice with college personnel to discuss the reasons for his impending lay-off. On July 25, Arganian met with Department Chair Head Dr. Anderson, who advised Arganian that the three factors considered in Arganian's selection for termination were the full-time to part-time ratio in his department, personal evaluations, and declining enrollment. Arganian then met with Ronald Dove, the Director of Personnel, on July 27. Dove explained Arganian was not fired, but merely laid off as part of a reduction in the work force. According to Arganian, Dove stated he could not give specific reasons for Arganian's layoff. The court specifically rejected Arganian's testimony to this effect as not credible.

Professor Taylor met with Dove on July 27. Although Taylor was not accompanied by an attorney at this meeting, he was accompanied by the vice-president of his union, Dennis Meyer. When Dove began to tell Taylor why he was laid off, Taylor responded he did not want to "hear it" from

Dove. Neither Arganian or Taylor, nor the representatives, asked for any documents or additional facts concerning their selection for lay-off, nor did the plaintiffs request further opportunities to meet with Dove or other college representatives.

On or about August 12, Arganian and Taylor, as well as other faculty members, filed written grievances protesting their lay-off under the collective bargaining agreement. On August 25, prior to the effective date of their lay-off, the first of three hearings was held. At this hearing, the college presented specific reasons and findings that led to the selection of Arganian and Taylor for lay-off, including declining enrollment figures, full-time and part-time ratios, and performance evaluations. The plaintiffs made no request for additional documentation to support this data. Following two extensions requested by the professors, a second hearing was held on September 13. A third hearing was held on October 25. During both hearings, the parties discussed the bases for the two men's selection for lay-off and the underlying economic circumstances. The only documentation requested was previous promotion scores. On November 23, following the hearings, Arganian and Taylor received a detailed written explanation for their lay-offs. The lay-off grievances went into arbitration in July and August of 1984. The arbitrator determined the lay-offs did

not violate the collective bargaining agreement.

The court found that the college faced a financial exigency for the fiscal year of 1983-1984 and took various measures to reduce the deficit by over one million dollars prior to resorting to lay-offs of full-time staff. The court gave weight to testimony by the college business manager, Bruce Newman, that financial difficulties began in the 1979-1980 fiscal year due to decreasing revenues and increasing costs. State appropriations were cut dramatically between 1979 and 1983 and state support per student declined by almost 11% during that time period. At the same time, salaries, which represented 70-75% of the budget, increased by approximately 26%. To combat the financial problems, the college increased student tuition by 45% during 1979-1983 and did not fill vacated positions. By April of 1983, the college anticipated a budget deficit in the amount of $2,331,000. The board established a budget and finance task force to study what means might be taken to generate revenue and save money. In June, the college's attempts to raise an additional $610.000 through a millage was defeated. At this time the anticipated deficit was $1,674,000. The college then instituted the following cost-reduction measures: (1) tuition was raised by an additional dollar per credit hour; (2) the president declined a salary increase; (3) the members of the president's council agreed to accept only a 5% raise

instead of the scheduled 8% increase, part-time personnel budgets were reduced; and, (4) the school offered an early retirement option. These measures reduced the budget deficit by $343,270.

The district court also addressed the manner in which Arganian and Taylor were selected for termination. The court found that use of only three of fourteen criteria, formulated by agreement between the college and union, was a rational basis for the lay-offs. The standard criteria, which were not prioritized, were as follows: (1) affirmative action; (2) budgetary restrictions; (3) community needs; (4) cost effectiveness; (5) credit hour production; (6) diversity of personnel; (7) ease of program delivery; (8) enrollment trends; (9) institutional needs and program priorities; (10) interdisciplinary adaptability; (11) length of employee services; (12) personal evaluations and qualifications; (13) program costs; and (14) ratio of full-time to part-time employees. Arganian and Taylor taught in the Division of Arts and Science and the Dean of the Division, Sam Kintzer, was given primary responsibility for making the initial selections for staff reduction. Kintzer considered three criteria most relevant to his department's layoff determinations: (1) the three-year history of program enrollments; (2) the ratio of full-time to part-time faculty; and (3) performance evaluations. Kintzer was particularly

concerned with the full-time and part-time ratio. Kintzer determined that program costs, ease of program delivery, and community needs were not particularly relevant categories. He also considered it meaningless to compare the faculty members on length of service because most of the faculty had long tenure. Deans from other divisions apparently gave different weight to various criteria and did not employ the precise method used by Kintzer. The court concluded that its role was not to determine whether the three criteria used by Kintzer were the best criteria, simply whether the criteria used by Kintzer were rationally based. The court concluded that Kintzer's emphasis of the three criteria was rationally based and permissible.

Based on the record before us, we find the district court did not improperly grant summary judgment to the defendants. Although we refrain from agreeing at this time with the district court's suggestion that *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), is the standard by which this matter should be judged, we find the record sufficient to support a conclusion that a Whitsel-type hearing, see *Whitsel v. Southeast local School District*, 484 F.2d 1222 (6th Cir. 1973), was afforded the plaintiffs. In Whitsel, we found that a teacher's continuing contract could not have been terminated without a hearing in which he would be informed of the grounds for dismissal and be given

an opportunity to challenge the sufficiency of the grounds. 484 F.2d at 1222. We emphasized that this finding was derived from the pertinent Ohio statute, which specifies the grounds for termination of a continuing contract. The Ohio statute requires written notice, time to prepare a defense, the option of a referee to conduct the hearing instead of the school board, a stenographic record, the right of confrontation, the right to cancel, and the right to subpoena witnesses. Id. at 1229. Our finding in *Whitsel* was based upon a notion that the Ohio statue satisfied federal constitutional due process requirements. However, we never held in Whitsel that the requirements in the Ohio statute represented minimum standards of federal constitutional due process. Id. ("[T]ested by every standard ever enunciated, these rights [as announced in the Ohio Statute] constitute procedural due process in a termination proceeding.").

The record developed at the evidentiary hearing on remand clearly reveals that the professors were given sufficient notice and opportunity to challenge the grounds for their lay-off prior to the effective date of the lay-off. The court expressly found that the lay-off did not occur until forty-five days after the date on which the board voted to lay-off the two professors. Both professors received immediate written notice of their impending lay-off and an explanation that the basis for their lay-off was a staff reduction due to a

financial exigency. Both men had actual or constructive knowledge of the underlying budget troubles and, within a week of receiving the notice, both professors met with the personnel director who attempted to explain the manner in which their names were selected for lay-off. Both men also had opportunity for a more elaborate pre-termination hearing at the level-two grievance proceeding on August 25, 1983. We also find sufficient evidence in the record to support the district court's conclusion that the college faced an exigent financial circumstance and that the choice of three of the fourteen criteria as the basis for terminating Professors Arganian and Taylor was reasonable. Plaintiff's equal protection and free speech arguments are without merit.

For the foregoing reasons the district court is affirmed.

NO. 89-1682

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHNSTON-TAYLOR, Individually and as Administratrix of the Estate of Edward Taylor, Brinton Scott, Kimberly Taylor, Individually; David Arganian; Lillian Arganian, Individually,

Plaintiffs-Appellants

On Appeal from the United States District Court for the Western District of Michigan

v.

Philip J. Gannon, Individually and as President of Lansing Community College; Board of Trustees of Lansing Community College, Individually, Jointly and Severally,

_____/

Before: MARTIN and JONES, Circuit Judges; and FEIKENS, Senior District Judge[1]

---

[1]. The Honorable John Feikens, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

BOYCE F. MARTIN, JR., Circuit Judge. David Arganian and the estate of Edward Taylor appeal the district Court's decision granting summary judgment for Philip J. Gannon, President of Lansing Community College, and the Board of Trustees of Lansing Community College in this wrongful discharge action. Arganian and Taylor, former professors at Lansing Community College, contend that their procedural due process rights were violated because they were denied a hearing on the necessity of a lay-off under which they were discharged. Because we believe there is a sufficient question of the validity of the procedural due process provided to Professors Arganian and Taylor, we reverse and remand.

Lansing Community College hired David Arganian in 1961 and Edward Taylor in 1966 as full-time instructors. Professor Arganian became a tenured faculty member in 1968. Professor Taylor was employed pursuant to a continuing contract.

In 1968, the College faculty voted to establish a collective bargaining unit, and thereafter the Board of Trustees and the faculty union entered into a collective bargaining agreement. Both Arganian and Taylor were charter members and active members of the faculty union. When the professors were discharged in 1983, Taylor was

president of the union and a vocal critic of President Gannon and the Board of Trustees. The professors contend that Gannon and the Board wanted to discharge them for personal and other reasons but lacked good cause under the collective bargaining agreement. The College claims that a financial exigency existed at the time and that both were dismissed under a reduction in staff.

The college claims that several factors caused the alleged financial exigency. During the fiscal 1982-83 year, the State of Michigan reduced a portion of the College's state aid. In March 1983, the Board of Trustees contracted to purchase $250,000 of high technology equipment. Anticipating a large budget deficit, the Board authorized a millage election under Michigan law which allows a local community to impose a tax upon itself for a specific purpose. The millage proposal was defeated in June 1983.

In response to the budget deficit, the College increased tuition by $1/credit hour and decreased spending in a number of areas. In addition, the College approached the leadership of the five employee bargaining units to obtain wage or benefit concessions. Only one union agreed to any of the proposals. Professor Taylor was president of the faculty union when it rejected the proposals.

The College thus decided to reduce its faculty to balance the budget. The agreement between the College and

the faculty union covered the employment of the faculty and also provided for reductions. Essentially, the agreement gave the Board of Trustees the exclusive right to determine a reduction in the number of faculty employed by the College. The faculty association, however, had the right to make recommendations and agree to a mutually satisfactory process for the reductions.

In June of 1983, the College and various unions bargaining representatives, including Taylor, signed a memo which detailed various criteria for the reduction. President Gannon directed the deans of the College's divisions to conduct program reviews in accordance with the agreed upon criteria and to recommend people for possible layoff. Later, Gannon assigned each division a share of the budget deficit to eliminate by reduction of staff. He also appointed a review committee, of which he was not a member, to assist the deans in applying the criteria in their program reviews.

Sam Kintzer was Dean of the Division of Arts and Sciences where Professor Arganian and Taylor taught. Dean Kintzer selected only three of the fourteen recommended criteria as most relevant to his division: 1) enrollment trends, (2) ration of full-time to part-time faculty, and (3) personal evaluations and qualifications. He ranked all the programs in the division by percentage of enrollment decline over the three previous years and the ratio of full-time to

part-time faculty. Instructors in the programs with the greatest decline and the highest ratio were then ranked by their performance evaluations. These evaluations had been conducted for several years and consisted of 60% administrative ratings and 40% student ratings. Dean Kintzer then determined which faculty members should be laid off. His recommendations included Professors Arganian and Taylor.

President Gannon did not substitute or alter any recommendations and forwarded them to the Board of Trustees for acceptance. The Board approved the layoffs on Arganian and Taylor. Subsequently, Arganian and Taylor accepted part-time employment with the College. On February 5, 1986, Taylor committed suicide, allegedly due to depression over his dismissal.

Several of the laid-off faculty, including Arganian and Taylor, filed grievances under the agreement alleging that the College's reduction in staff was "arbitrary, capricious and in bad faith." The grievances went to arbitration. The arbitrator determined that the College was subject to a covenant of good faith. The arbitrator found no arbitrary and capricious conduct and that the administration exercised good faith managerial judgment after duly considering all permissibly relevant factors.

After the arbitration decision, Professor Arganian and

Professor Taylor's estate filed a four-count complaint alleging that President Gannon and the Board of Trustees violated 42 U.S.C. sec. 1983 by abridging Taylor's first amendment rights, the due process rights of both, the Michigan Elliott-Larson Civil Rights Act as to both, and the Michigan Wrongful Death Act as to Taylor.

The district court initially addressed the due process claims, as to procedural due process, the district court found that it must first determine whether a protected property interest exists. Both Arganian and Taylor claimed a protected property interest under the collective bargaining agreement in their continued employment and Arganian claimed an additional basis for a property interest as a tenured employee before the agreement went into effect. The district court found that the agreement controlled the employment relationship of both, as the agreement superseded any tenure rights Professor Arganian had.

After the district court assumed that Arganian and Taylor possessed a legitimate expectation of continued employment under the agreement, it then determined what due process was constitutionally required. The court found that the collective bargaining agreement provided procedural safeguards to protect the employees and provided for three types of discharge: just cause, non-renewal of contract, and reduction in staff, the method used to discharge Professors

Arganian and Taylor. The district court agreed with the arbitrator that the agreement's procedural safeguards had been observed and that no material fact existed as to whether Arganian and Taylor had received all of their contractual rights under the grievance procedure.

The district court stated, however, that the critical issue was whether the requirements of constitutional due process were observed. The district court determined that the grievance procedure specified in the agreement satisfied the requirements of constitutional due process and thus concluded that there was no violation of procedural due process as to Arganian's and Taylor's protected property interests.

Professors Arganian and Taylor also claimed that they were deprived of their vocational liberty interests without due process. The district court found the allegations supporting this claim to be legally and factually insufficient to demonstrate that Arganian and Taylor had a definite range of opportunities no longer open to them. *Lake Michigan College Federation of Teachers v. Lake Michigan Community College*, 518 F.2d 1091, 1097-98 (6th Cir. 1975).

As to substantive due process, the district court found that Arganian and Taylor had to show that the College's conduct was arbitrary, capricious, and without a rational basis. The district court held that the three criteria used by

Dean Kintzer in determining layoffs had a rational basis and that the determination of a financial exigency was made in good faith, and thus the College did not violate the substantive due process rights of Arganian and Taylor.

The district court then examined the claim that Taylor's first amendment rights were violated because he was laid off due to his criticism of President Gannon and his union activity. The court assumed that Taylor's conduct was constitutionally protected, but found there was no evidence that Taylor was dismissed because of his criticism and union activity. Thus, the court concluded that the protected conduct was not a substantial or motivating factor for the adverse action. *Connick v. Myers*, 461 U.S. 138 (1983).

Additionally, the district court, relying on *Poe v. Haydon*, 853 F.2d 418 (6th Cir. 1988), held that President Gannon and the Board of Trustees were also entitled to summary judgment on the federal claims on the basis of qualified immunity. The court determined that there was insufficient evidence to create a genuine issue as to the truth of the allegations that Gannon and the Board committed acts that violated clearly established law. Accordingly, the court found that the undisputed facts showed that reasonable officials in similar positions could have believed their conduct to be lawful.

Both claims under the Michigan Wrongful Death Act

and the Michigan Civil Rights Act were pendent state claims and were therefore dismissed by the district court because it had found that summary judgment was appropriate on the federal claims. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). Because these state law issues were not raised on appeal and because of our resolution of the case, we need not consider them now.

The primary issue on appeal is whether Professors Arganian and Taylor were denied procedural due process. Arganian and Taylor's estate contend that under the collective bargaining agreement Arganian and Taylor had a protected property interest in their continued employment as professors at a public college and that Arganian had an additional interest as a tenured professor. They argue that due process requires that they receive a hearing on the reason for their discharge, in this case on whether there was a legitimate financial exigency facing the College, and on why they were selected for discharge. The professors claim that they were not given the reasons for their selection until after they were dismissed and that there was never a hearing on the existence of the financial exigency.

We engage in a two-step analysis when resolving procedural due process issues. We initially determine whether a protected property or liberty interest exists and then determine what procedures are required to protect that

interest.

Public college professors have a constitutionally protected property interest in their teaching positions when they have a legitimate expectation of continued employment. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). A professor subject to a continuing contract has a legitimate expectation of continued employment and, therefore, has a protected property interest. *Whitsel v. Southeast Local School District*, 484 F.2d 1222, 1229 (6th Cir. 1973), citing *Perry v. Sindermann*, 408 U.S. 593 (1972). Because the collective bargaining agreement in this case provided for continuing employment, we find that both Professor Arganian and Taylor had a protected property interest which could only be terminated in accordance with due process under the fourteenth amendment.

In addition, a public college professor with tenure also has a legitimate expectation of continued employment and therefore, has a property interest which is protected by due process. *Roth*, 408 U.S. at 576, citing *Slochower v. Board of Education*, 350 U.S. 551 (1956). The district court incorrectly determined that Arganian's tenure rights had coalesced into the rights of continuing contract. There is simply no legal foundation for this hold by the district court. Thus, Professor Arganian had an additional basis for a protected property interest as a tenured employee of the College.

Given that both Arganian and Taylor possessed a protected property interest in their continued employment with the College, we turn now to determine what due process was constitutionally required to protect that interest. The law is quite clear on this question. Professors with tenure or with a continuing contract may not be discharged without receiving a hearing in which they are informed of the grounds for their dismissal and given the opportunity to challenge the sufficiency of those grounds. *Whitsel*, 484 F.2d at 1228, citing *Perry*, 408 U.S. 593, and *Slochower*, 350 U.S. 551.

The College claims that Professors Arganian and Taylor were properly dismissed under a reduction in staff made necessary by a financial exigency. Yet neither Arganian nor Taylor were told the reason for their dismissal prior to their discharge. The professors did not receive a hearing on the existence of the financial exigency and were not informed of the criteria used to select them for discharge until the arbitration proceedings; the arbitrator never decided the issue of financial exigency. Thus, Professors Arganian and Taylor never had a sufficient opportunity to challenge the grounds for their dismissal, including the existence of the alleged financial exigency.

The district court found that the grievance procedure specified in the collective bargaining agreement satisfied the

requirements of constitutional due process and, therefore, found that summary judgment was appropriate on the procedural due process claim. We, however, are not completely satisfied that Professors Arganian and Taylor were afforded all the process due them. Because they never had the opportunity to challenge the grounds for their dismissal prior to their discharge, we believe there is a sufficient question of the validity of the procedural due process provided to them to warrant an evidentiary hearing.

As to the substantive due process claim, the issue is whether there was a rational basis for the layoffs. Arganian and Taylor contend that the purpose of the June 1983 memo was to set forth criteria for program review, not discharge of individual faculty. They also assert that because Dean Kintzer selected only three of the fourteen criteria recommended in the memo, their layoffs lacked a rational basis. Because the professors' contentions must be taken as true, we find that they have presented a material issue as to whether there was a rational basis. In addition, an evaluation of a "good faith" determination of financial exigency is needed to resolve this issue, which necessarily requires a determination of whether exigency in fact existed. Thus, an evidentiary hearing is also appropriate on the substantive due process issue.

Accordingly, we reverse the district court's grant of

summary judgment on the procedural and substantive due process issues and remand for an evidentiary hearing on those issues.

Such other issues raised in this appeal need not be addressed now. They may be considered by the district court as it may deem appropriate.

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SALLIE ELIZABETH JOHNSTON-TAYLOR, individually and as Administratrix of the Estate of Edward Taylor, BRINTON, SCOTT and KIMBERLY TAYLOR, individually, and DAVID and LILLIAN ARGANIAN, individually,

Plaintiffs,

v. File No. 1:86-CV-661
HON. ROBERT HOLMES BELL

PHILLIP J. GANNON, individually and as President of Lansing Community College, and the BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE,

Defendants.
_____/

OPINION

Plaintiffs appealed the entry of summary judgment for the defendants in this wrongful discharge case. The Sixth Circuit Court of Appeals reversed the decision in part and remanded for an evidentiary hearing on the issues of

procedural and substantive due process. Johnston-Taylor v. Gannon, 907 F.2d 1577, 1582, (6th Cir. 1990).

The Court met with counsel for both parties on January 10, 1991, and solicited their input on what procedures should be followed on this somewhat unusual remand. Thereafter the Court proceeded in the manner it thought best complied with the instructions of the Court of Appeals. An evidentiary hearing on the issues of procedural and substantive due process was held on March 14, 15, & 25, 1991. The Court's findings are set forth below.

The background facts are set forth in this Court's earlier opinion and in the Court of Appeals opinion. There is no need to reiterate them here. In this opinion the Court will focus on only those facts that are relevant to the precise issues outlined by the Court of Appeals.

1. Procedural Due Process

On the issue of procedural due process the Court of Appeals directed as follows:

> We, however, are not completely satisfied that Professors Arganian and Taylor were afforded all the process due them. Because they never had the opportunity to challenge the grounds for their dismissal prior to their discharge, we believe there is a sufficient question of the validity of the procedural due process provided them to warrant an evidentiary hearing.

Johnston-Taylor, 907 F.2d at 1582.

The Court of Appeals further stated that Arganian

and Taylor were not told the reason for their dismissal prior to their discharge, and did not receive a hearing on the existence of the financial exigency and were not informed of the criteria used to select them for discharge until the arbitration proceedings. Id. at p. 1581.

With all due respect to the Court of Appeals, the Court finds some ambiguity in these statements. It is not immediately clear whether they represent factual determinations, or whether they merely identify issues of fact contained in the record on appeal. In view of the fact that the Court of Appeals directed that there be an evidentiary hearing on the process accorded to the professors, these statements are interpreted by this Court not as binding factual determinations but as issues of fact requiring further evidentiary development.

The evidentiary hearing revealed that Arganian, Taylor and 20 other faculty members were sent written notification on July 22, 1983, advising them that their employment with the College would cease in 45 days because of a reduction in staff.

Within the week Arganian had two meetings with College personnel to discuss the reasons behind the layoff.

On July 25, 1983, he met with his department chairperson, Dr. Anderson. Anderson advised him that factors considered in his selection were the full-time to part-

time faculty ratio in the department, personal evaluations, and declining enrollment.

Arganian, accompanied by his attorney, Joseph Warren, next met with Ronald Dove, the Director of Personnel, on July 27, 1983. Dove explained that Arganian had not been fired, but was merely laid off as part of a reduction in force. Arganian admitted that in response to his questions about the criteria used to fire him, Dove explained that the 14 criteria were taken into account, that the full-time to part-time faculty ratio in his department was out of line, that he had low personal evaluations, and that enrollment in his area, Western Civilization, was declining.

The Court finds Arganian's testimony that Dove stated he could not give the "specific reasons" for his layoff because Arganian's attorney was present incredible in light of Dove's statement to the contrary, Arganian's failure to mention this alleged statement in his sworn arbitration testimony a year after the meeting, and the admitted failure of either Arganian or his attorney to challenge or inquire further about the highly compromising nature of this alleged statement.

Taylor also met with Dove on July 27, 1983. Taylor was accompanied by Dennis Meier, Vice President of his union. When Dove began to tell him why he had been laid off he told him he really did not want to hear it from him.

Neither Arganian, Taylor, nor their representatives, asked Dove for any documents or additional facts concerning their selection for layoff, nor did they ask for any further opportunity to meet with Dove or other College representatives.

On or about August 12, 1983, Arganian, Taylor, and 6 other faculty members filed written grievances protesting their layoff under the collective bargaining agreement. Earlier, Dove had agreed to the request of their union representative that the time for filing the grievances be extended to August 15, 1983, and that the grievances be initially discussed at the second, rather than first, step of the grievance procedure.

On August 25, 1983, prior to the effective date of their layoff, the first of three hearings was held. At that hearing the College presented the specific reasons and findings that led to the selection of Arganian and Taylor for layoff, including the figures used in reviewing declining enrollment, full-time to part-time ratios, and performance evaluations. No request was made for documentation of this data.

After two extensions requested by the grievants for purposes of amending their grievances, a second hearing was held on September 13, 1983. A third hearing was held on October 25, 1983. During these hearings there was more discussion about the reasons for Arganian's and Taylor's

selection for layoff, and about the underlying economic circumstances that gave rise to the layoffs. The only documentation requested by Taylor, Arganian or their union representatives was previous promotion scores.

On November 23, 1983, following the hearings, Dove sent Arganian and Taylor a detailed written explanation for their layoffs. (Def. Exh. P).

The layoff grievances were then processed to an arbitration hearing before an Arbitrator in July and August 1984. In a decision dated December 19, 1984, the Arbitrator determined that the layoffs did not violate the collective bargaining agreement.

The issue before this Court is whether the layoffs complied with procedural due process.

Procedural due process issues require a two-step analysis. The Court must determine first whether there was a protected liberty or property interest and second, what procedures are required to protect that interest.

The first issue has already been determined. Because they were subject to a continuing contract, Professors Arganian and Taylor had a legitimate expectation of continued employment and, therefore, had a protected property interest. Johnston-Taylor, 907 F.2.d at 1581 (citing Whitsel v. Southeast Local School District, 484 F.2d 1222, 1229 (6th Cir. 1973)).

In addition, the Court of Appeals held that contrary to this Court's previous ruling, Professor Arganian's tenure rights did not coalesce into the rights of continuing contract, and therefore he had an additional basis for a protected property interest as a tenured employee of the College. Johnston-Taylor, 907 F.2d at 1581.

Having determined that there was a protected property interest, we move to the second step of the analysis: What process was due? The Court of Appeals stated that the law on what process was constitutionally required is quite clear: "Professors with tenure or with a continuing contract may not be discharged without receiving a hearing in which they are informed of the grounds for their dismissal and given the opportunity to challenge the sufficiency of those grounds." Id. at 1581 (citing Whitsel, 484 F.2d at 1228.

Stating the necessity for notice and a hearing, however, does not end the analysis. The Court must still determine the nature and timing of the required hearing.

Due process is flexible and calls for such procedural protections as the particular situation demands. Mathews v. Eldridge, 424 U.S. 319, 334 (1976). It requires the opportunity to be heard "at a meaningful time and in a meaningful manner." Id. at 333. Not every situation will require an evidentiary hearing before, rather than after, the deprivation of a property interest. Id. at 333-34.

The Supreme Court has held that tenured public employees are entitled to a pre-termination hearing before they can be discharged for cause. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 545 (1985). The Sixth Circuit has not, however, directly addressed the procedures required in the context of a layoff due to financial exigency.

Bother the Collective bargaining agreement and the generally accepted concept of tenure permit a college to layoff a tenured teacher because of financial exigency so long as its action it demonstrably bona fide. See e.g., Krotfoff v. Goucher College, 585 F.2d 675, 678 (4th Cir. 1978). A bona fide dismissal based on financial exigency, unlike a dismissal for cause, is essentially impersonal, and does not threaten the values protected by tenure. Id. at 680. Academic freedom, which is protected by tenure, is not at stake when a teacher is dismissed not for cause but for financial reasons. Id. Accordingly, it is well recognized that the full procedural safeguards available when termination of a tenured faculty member is "for cause" are not required when the termination is based on a financial exigency. See e.g., Jinenez v. Almodovar, 650 F.2d 363, 368-69 (1st Cir. 1981); Browzin v. Catholic University of America, 527 F.2d 843, 847 (D.C. Cir.

1975).[4]

Jimenez, 650 F.2d at 370, involved the discharge of university professors upon the bona fide elimination of their positions. The Sixth Circuit cited Jimenez in support of the proposition that due process does not always require a pre-deprivation hearing when an interest in employment is affected. Ramsey v. Board of Education, 844 F.2d 1268, 1973

---

[4] The distinction between the procedural protections due when the layoff is for financial exigencies as opposed to cause is also reflected in the MIchigan Teachers' Tenure Act, M.C.L. sec. 38.71 et seq.; M.S.A. sec. 15.1971 et seq.. Under the Act, a tenured teacher may be terminated due to economic necessity. M.C.L. sec. 38.105; M.S.A. sec. 15.2005; Smith v. Wyoming Public Schools Board of Education, 128 Mich.App. 746, 749 (1983). However, in such a case the Act's notice and hearing protections do not apply. Steeby v. School District of the City of Highland Park, 56 Mich.App. 395, 398-99 (1974):

> Indeed, there would appear to be no real reason for a hearing where the reason for termination is a reduction in personnel rather than personal charges against a teacher, since the purpose of the hearing in to provide the opportunity for the teacher to answer the charges being brought against him. The protection which the act provides where the termination is the result of a reduction of personnel is not that of a pointless hearing but is rather that found in MCLA 38.105, supra, which provides that those tenure teachers thereby terminated shall be appointed to the next vacancy.

Id. at 399. When a teacher is laid off because of economic necessity, notice and hearing "would constitute a useless gesture since neither his conduct nor performance is being called into question." Chester v. Harper Woods School District, 87 Mich. App. 235, 244 (1978).

(6th Cir. 1988).

Other courts have also recognized that a post-decision hearing process is adequate when a teacher is laid off for financial exigency rather than for cause. Bignall v. North Idaho College, 538 F.2d 243,248 (9th Cir. 1976); Johnson v. Board of Regents, 377 F. Supp. 227, 239 (W.D.-Wis. 1974), affirmed, 510 F.2d 975 (7th Cir. 1975). The basis for this difference, as recognized by the Sixth Circuit in Ramsey, 844 F.2d at 1273-74, is that a layoff due to bona fide elimination of position or financial exigency does not impact the special nature of tenure rights.

In this case, because Arganian and Taylor were laid off as a result of a reduction in personnel due to financial exigencies rather than because of any personal charges against them, whatever process was due them was less than that required in Loudermill.

In the for cause termination in Loudermill the Court required a pre-termination hearing, but held that the hearing need not be elaborate. Id.

> The tenured public employee is entitled to oral or written notice of the charges against them, an explanation of the employer's evidence, and an opportunity to present his side of the story.

Id. at 546. Where state law provides for a full administrative post-termination hearing and judicial review, the pre-termination hearing need not definitively resolve the

propriety of the discharge. Id. at 545. It merely serves as an initial check against mistaken decision. Id. A pre-termination interview, even by one who is not actually empowered with the authority to fire, is enough to satisfy due process. Loudermill v. Cleveland Board of Education, 844 F.2d 304, 312 (6th Cir. 1988) (on remand), cert. denied, 488 U.S. 941 (1988).

While notice of the grounds for dismissal prior to discharge may not have been clear from the record before, the record developed at the evidentiary hearing on remand clearly revealed that the professors were given notice and opportunities to challenge the grounds for their layoff prior to its effective date.

The date of the layoff was not, as plaintiffs claim, on July 22,1983, when the Board voted to lay them off. The layoff did not occur until 45 days later, as indicated in the layoff notice. Plaintiffs' attempt to define the time the decision to terminate is made as the time termination occurs was flatly rejected in Bignall, 538 F.2d at 246. See also, Chung v. Park, 514 F.2d 382, 386 n.7 (3rd Cir. 1975), cert. denied, 423 U.S. 948 (1975); Vance v. Chester County Board of School Trustees, 504 F.2d 820, 825-26 (4th Cir. 1974).

In this case Arganian and Taylor received immediate written notice of the layoff and an explanation that the basis for their layoff was a staff reduction due to a financial

exigency. Both had actual or constructive knowledge of the underlaying budget shortfall leading to the lay-off decision and the opportunity to confront the defendants regarding this budget problem prior to the effective date of their lay-offs.

Within a week of receiving notice, the personnel director sat down with Arganian and Taylor and their selected representatives and attempted to explain the manner in which their names were selected for layoff. Since it is the opportunity to respond that is important, Taylor's decision not to listen to the reasons is irrelevant to our review of the procedures made available. Loudermill, 844 F.2d at 312 (citing Lee v. Western Reserve Psychiatric Habilitation Center, 747 F.2d 1062, 1068-69 (6th Cir. 1984).

Arganian and Taylor also had an opportunity for a more elaborate pre-termination hearing at the Level 2 grievance proceeding on August 25, 1983. At the Level 2 grievance they and their union representative met with the director of personnel to discuss the issues surrounding the layoffs. That the subsequent hearings went beyond the date of termination was not a result of delay on the part of the College. Through this proceeding Arganian and Taylor received oral notice of the basis for the discharge, an explanation of the College's evidence, and an opportunity to present their side of the story.

Subsequent to termination Arganian and Taylor had a right to a full arbitration hearing and judicial review.

Because the professors were not discharged for cause but for financial exigency, they were entitled to less procedural safeguards than described in Loudermill. Nevertheless, even if Arganian and Taylor were entitled to all the procedures outlined in Loudermill, there is no question of fact that they received them.

Neither in the pleadings nor in the testimony presented at the evidentiary hearing has plaintiff been able to show the existence of a sufficient issue of fact for the jury. Both professors received all the process they were due.

2. Substantive Due Process

On the issue of substantive due process the Court of Appeals directed as follows:

> As to the substantive due process claim, the issue is whether there was a rational basis for the layoffs. Arganian and Taylor contend that the purpose of the June 1983 memo was to set forth criteria for program review, not discharge of individual faculty. They also assert that because Dean Kintzer selected only three of the fourteen criteria recommended in the memo, their layoffs lacked a rational basis. Because the professors' contentions must be taken as true, we find that they have presented a material issue as to whether there was a rational basis. In addition, an evaluation of a "good faith" determination of financial exigency is needed to resolve this issue, which necessarily requires a determination of whether exigency in fact existed. Thus, an evidentiary hearing is also appropriate on the substan-

tive due process issue.

Johnston-Taylor, 907 F.2d at 1582.

A. Purpose of Criteria

The Court of Appeals remanded in part for an evidentiary hearing as to the purpose of the June 1983 memo. Plaintiffs contended it set forth criteria for program review, not for discharge of faculty.

The June 1983 memo is a one page document entitled Recommendations Regarding Reductions in Personnel During a Period of Impending Layoff. Joint Exhibit 2. It was signed by the representatives of the 5 employee associations on July 8, 1983. The document states that the association representatives met as a group "to present their recommendations, regarding staff reductions". The recommendations read in part as follows:

> 1. Any areas to be affected by staff reductions will be determined through program reviews and/or program, departmental or divisional reorganizations.
>
> 2. The criteria to be used for program reviews and program, departmental or divisional reorganizations shall include, but not be limited to the following: (The following list does not imply a priority listing.)
>
> [14 criteria are listed]

The final paragraph notes that the document does not preclude employee association representatives from making other recommendations "regarding personnel reductions". In

light of the clear language of the document, defendants' argument that the list is not for the purpose of staff reductions is disingenuous.

The Court finds the purpose of the criteria was to provide guidance for staff reductions and that there is no question of fact on this point.

B. Selection of Criteria

This Court has been asked to make evidentiary findings on whether the application of only 3 of the 14 criteria provided a rational basis for the layoffs.

The MAHE contract with the college provides in Article VI Section X that representatives from the Faculty Association and the Administration will meet to develop a mutually satisfactory process of reducing staff. The contract further provides:

> Criteria to be considered prior to a staff reduction <u>may</u> include, but will not be limited to:
>
> --length of service of the faculty member at L.C.C.,
> --institutional needs and program priorities,
> --budgetary restrictions,
> --enrollment trends,
> --interdisciplinary adaptability.

(Joint Exh. 5, p. 28) (emphasis added).

Using these guidelines, the union representatives and the administration arrived at a list of 14 criteria to consider in the staff reduction. The criteria, not in order of any priority, include, but are not limited to the following:

- affirmative action
- budgetary restrictions
- community needs
- cost effectiveness
- credit hour production
- diversity of personnel
- ease of program delivery
- enrollment trends
- institutional needs and program priorities
- interdisciplinary adaptability
- length of employee service
- personal evaluations/qualifications
- program costs
- ratio of full-time to part-time employees

Personnel Director Ronald Dove notified the union presidents on July 15, 1983, that a reduction in force would be submitted to the Board by July 22, 1983. A review team of 4 administrative representatives was formed to meet with divisional deans to review their programs. Dove and the committee met with all 5 academic deans and found that some of the 14 criteria were more applicable to some departments than to others.

Plaintiffs taught in the Division of Arts & Science. Dean Sam Kintzer was given primary responsibility for making the initial selection of individuals in his division for the staff reduction. Dean Kintzer was very methodical in his approach, and after considering all 14 criteria, selected three that he found were most relevant to his division. He used the 3 year history of program enrollments, the ratio of full-time to part-time faculty in specific program areas, and

performance evaluations.

Dean Kintzer was particularly concerned with the ratio of full-time to part-time faculty in a particular program area because if he were to lose all full-time faculty members in a department, the quality of that program would suffer considerable. On the other hand, if he had multiple full-time faculty members assigned to teach similar courses, the loss of one full-time faculty member in that area would not have as great an impact on the quality of the particular program.

Given the nature of the courses taught in his division, Kintnzer determined that program costs, ease of program delivery and community needs were not particularly relevant. He also found length of service not particularly relevant in his division because most of the faculty, particularly in the Humanities and Social Science Divisions, had long tenure, so it was not particularly meaningful to compare them on the basis of longevity.

Applying these standards, Kintzer recommended the layoff of three individuals: Edward Taylor from Social Science, David Arganian from Humanities, and John Manion from Communications. The review team reviewed with Kintzer his selection process and staff reduction recommendations.

The other deans also chose from among the 14 criteria those most relevant to their circumstances. The weight

given to various criteria differed from one division to the next. No deans made selections solely on the basis of length of service. Depending on the division's needs, some deans focused primarily on factors such as diversity or versatility, discontinuation of a program, low performance evaluations, or credit hour production. In other divisions as well, more senior faculty members were laid off where less senior members fared better on other criteria, such as diversity of personnel.

Retention of less senior faculty and consideration of factors such as evaluations and school needs were found acceptable in Bignall, 538 F.2d at 250.

The Court is not called on to determine whether the three criteria selected by Dean Kintzer were the most meaningful or best or fairest criteria, or whether the Court would have used the same criteria. Under the substantive due process analysis the Court may only review the selection of 3 of 14 criteria to determine whether they were rationally based.

The Court finds that when a list of criteria is formulated that applies to all groups within the College, it is reasonable to determine that some criteria will have greater relevance in one division than in another. Dean Kintzer's selection of the 3 year history of program enrollments, the ratio of full-time to part-time faculty in specific program

areas, and performance evaluations was not arbitrary, capricious, or without a rational basis. See Brenna v. Southern Colorado State College, 589 F.2d 475, 477 (10th Cir. 1978).

C. Financial Exigency

The Court of Appeals noted that the arbitrator never decided the issue of financial exigency and specifically remanded for an evidentiary hearing to evaluate whether a financial exigency in fact existed.

Bruce Newman, College Business Manager in 1982-3, testified that financial difficulties began in the 1979-1980 fiscal year due to decreasing revenues and increasing costs. State appropriations, which accounted for approximately 40% of the College's revenues, were cut by $1,555,000 between 1979 and 1983. State support per student declined by 10.8% during this period. State payments were also delayed, which adversely impacted the College's cash flow and interest income opportunities. Between 1979 and 1983, salaries, which represented 70-75% of the budget, increased by approximately 26%.

Defendants also presented evidence that the school took numerous steps to address the financial problems. The College increased student tuition by 45% between 1979 and 1983, and did not fill vacated positions. In March the Board proposed a millage request to raise $610,000. Despite the

College's efforts, in April 1983 the College anticipated a budget deficit in the amount of $2,331,000. Accordingly, the Board established a Budget and Finance Task Force, which included representatives from the board, administration, 4 union members (including Plaintiff Taylor) and a student. The objective of the task force was to look at ways to generate revenues and to save money.

In June, after the College's millage request was defeated, the College intensified its efforts to balance its 1983-84 budget. The deficit at this time was calculated to be $1,674,000. The administration held 9 meetings with union officials in an attempt to negotiate contract concessions to help alleviate the pending deficit. Taylor participated in these meetings the (sic) as president of M.A.H.E. The College raised tuition by an additional $1.00 per credit hour. The president declined a salary increase, members of the president's council agreed to accept 5% instead of the scheduled 8% increase, there was a reduction in part-time personnel budgets, and the school offered an early retirement option. As of July 1983 the deficit was reduced by these actions to $343,270.

The task force solicited ideas from faculty, staff, students, and other interested parties on ways to save money. Plaintiff Taylor was intimately involved in formulating the Budget Task Force recommendations. In a letter

submitted to the president on May 23, 1983, the task force acknowledged the need to make cutbacks to help eliminate a pending $1,760,000 deficit:

> We have been studying the college's tentative budget for 1983-84 fiscal year. We know that cutbacks will be required to help eliminate a pending $1,760,000 deficit even if State appropriations are increased beyond the current amount.

The letter was signed by members of the Task Force, including Ed Taylor. (Jt. Exh. 4, p. 23, 25).

Arganian, as a faculty member and member of M.A.H.E., was represented by Taylor on the Budget and Finance Task Force and in the joint administration and union officials meetings. As a faculty member he received communications from the Task Force soliciting his ideas for balancing the budget, (Jt. Exh. 4, p. 26), and he attended a faculty Senate meeting where the president, Dove and Newman appeared to answer questions the faculty might have about the impending budget deficit.

A memorandum dated July 8, 1983 was sent by the union presidents (including Taylor), the director of Personnel and the business manager to all bargaining unit personnel. The memo stated in part:

> Based on the current position of the association representatives, of not amending the existing contract provisions, the Board representatives stated that would be necessary to reduce personnel and that this process will be coupled with other voluntary or non-contractual means of

reducing costs.

(Jt. Exh. 4, p. 50).

The testimony as to the budget shortfall and the steps taken by the school to address the shortfall was not rebutted by the plaintiffs. Plaintiffs merely suggest that it was a violation of their substantive due process rights for the college to lay them off rather than forego any purchase of equipment.

In March 1983 approximately $250,000 was authorized for equipment from earmarked building and site funds. This amount was matched from vocational education sources and was not available for use for salaries. Moreover, plaintiffs' dispute with the manner in which the College met the financial exigency raises a political question rather than a constitutional question. The issue for this Court is not whether the College made the best decision. It is not for the court or jury to substitute its judgment for that of the administrative body on how best to spend the limited public funds entrusted to it. The only issue before this Court is whether the College's decision was rationally based upon a true financial exigency.

This Court finds that there is no question of fact regarding the bona fide existence of a financial exigency. Neither is there evidence that the reduction in force was arbitrary or generated by ill will, fraud, collusion or such

other improper motives. Defendants are accordingly entitled to summary judgment on the issue of substantive due process.

Plaintiffs' motion for summary judgment

After remand plaintiffs filed a motion for partial summary judgment. This is beyond the scope of the remand, and moreover is made moot by the findings of this Court after the evidentiary hearing. Accordingly, the motion must be denied.

Date: November 14, 1991 S/_____
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SALLIE ELIZABETH JOHNSTON-TAYLOR, individually and as Administratrix of the Estate of Edward Taylor, BRINTON SCOTT and KIMBERLY TAYLOR, individually, and DAVID and LILLIAN ARGANIAN, individually,

Plaintiffs,

v. File No. 1:86-CV-661
HON. ROBERT HOLMES BELL

PHILLIP J. GANNON, individually and as President of Lansing Community College, and the BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE,

Defendants.
_____/

ORDER

In accordance with the opinion entered this date.

IT IS HEREBY ORDERED that summary judgment if GRANTED in favor of the defendants on the issues of procedural due process and substantive due process.

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment (Docket #180) is DENIED.

IT IS FURTHER ORDERED that this case is DISMISSED.

Date: November 14, 1991 S/ _____
ROBERT HOLMES BELL
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SALLIE ELIZABETH JOHNSTON-TAYLOR, individually and as Administratrix of the Estate of Edward Taylor, BRINTON SCOTT and KIMBERLY TAYLOR, individually, and DAVID and LILLIAN ARGANIAN, individually

Plaintiffs, G86-661-CA5
HON. ROBERT HOLMES BELL

V.

PHILIP J. GANNON, individually and as President of Lansing Community college (sic), and the BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE, individually, jointly, and severally,

Defendants.

_____/

OPINION

Before the Court is Defendant's motion for summary judgment on all four counts of Plaintiffs complaint. Plaintiffs claims that Defendants violated the Due Process Right of David Arganian and Edward Taylor, the First Amendment rights of Taylor, the Michigan Wrongful Death Act at to Taylor, and the Michigan Elliott-Larsen Civil Rights Act as

to both Arganian and Taylor.

BACKGROUND

As appears from the parties' pleading and briefing, Lansing Community College (LCC) hired David Arganian (Arganian) in 1961 and Edward Taylor (Taylor) in 1966 as full-time instructors. By 1968 Arganian completed his probationary period and was granted tenure. In 1968 the LCC faculty voted to establish a collective bargaining unit. Thereafter, the Board of Trustees of Lansing Chapter of the Michigan Association for Higher Education at Lansing Community College (MAHE) entered into a collective bargaining agreement (Agreement) Taylor was an active charter member of MAHE and was a vocal critic of Philip J. Gannon (Gannon), President of LCC.

Both Arganian and Taylor were working as full-time instructors on July 22, 1983, when the Board terminated their full-time employment. Defendants allege that a financial exigency existed at the time and that Arganian and Taylor were dismissed under a reduction in staff. Afterwards Arganian and Taylor accepted part-time employment with LCC. During the academic year 1982-83 Taylor was president of the local chapter of MAHE at LCC. On February 5, 1986, over two years after his termination, Taylor committed suicide. Plaintiffs allege that Taylor's suicide

resulted from depression over his termination.

The parties dispute the reasons for the termination of Arganian and Taylor. Arganian and Taylor maintain the budget deficit was merely a pretext. They contend that Gannon wanted to discharge them for personal and other reasons but laced good cause under the Agreement. LCC maintains the terminations were part of a reduction in staff designed to relieve LCC from a budget deficit.

LCC maintains that several factors caused the budget deficit. For example, cuts in state appropriations in September, 1982 and March 1983 totalling $798,437.00 contributed to the budget deficit. Also, in March of 1983 the Board approved purchase of $25,000 of high technology equipment requested by various departments. However, a millage election authorized by the Board to fund the purchase of the equipment was defeated in June, 1983. Nevertheless, LCC still purchased the equipment.

After the millage defeat the pending budget deficit for fiscal year 1983-84 was $1,674,000. (Affidavit of Bruce Newman, paragraph 20). To enhance revenues and reduce expenditures, LCC increased tuition by one dollar per credit hour, reduced its maintenance program, decreased supply purchases, limited new and replacement hiring, and offered early retirement options to present employees. This retrenchment reduced the anticipated budget deficit to $343-

,270 for fiscal year 1983-84.

To further balance its budget LCC approached the leadership of the five employee bargaining units to obtain wage or benefit concessions. In the 1981 contract, LCC and MAHE agreed to an 8% increase in faculty salaries for 1983-84. To alleviate the budget deficit LCC proposed to reduce the wage increase from 8% to 5% or possibly 6% if certain benefit concessions were made, for 1983-84. After nine meetings only one union agreed to any of LCC proposals. Taylor was the president of MAHE when it rejected the proposals.

Failing to gain concessions from the unions, the LCC administration determined to reduce its staff to balance the budget. The Agreement between LCC and MAHE covered Taylor's and Arganian's employment and also provided for reductions in staff. Essentially, the Agreement gave the Board the exclusive right to determine a reduction in staff. However, the faculty association had the right to make recommendations and agree to mutually satisfactory process for the stall reduction. The Agreement also provided certain non-exclusive criteria for reductions.[5]

---

[5] Section VI, Part X, of the Agreement entitled, "Reductions in Staff," provides:

1. The Faculty Association recognizes the exclusive right of the Board of Trustees to determine reductions in personnel and/or

On June 30, 1983, LCC and various union bargaining representatives, including Taylor as president of the MAHE signed a memorandum entitled, "Recommendations Regarding Reductions in Personnel During a Period of Impending Layoff," providing these joint recommendations:

> In consideration of the contractual provisions regarding reduction of personnel, the following recommendations are submitted to the President and/or the board of Trustees by the undersigned:

---

operations and the exclusive right to determine the area in which such reductions will be made subject to the provisions contained with this Agreement.

2. During a period of impending layoff, the Board agrees to attempt to accomplish staff reduction by natural attrition (such as resignation, retirement, etc.) and will consider requests for voluntary leaves of absence without pay.

3. Prior to any reduction in staff within the MAHE unit, the Faculty association will be provided an opportunity to present recommendations to the President or his/her designated representative(s) and the Board of Trustees regarding such reductions for consideration prior to the final decision.

4. Once it has been determined that a reduction in staff is necessary, representatives from the Faculty Association and the Administration will meet in an attempt to develop a mutually satisfactory process of reducing staff. Criteria to be considered prior to a staff reduction may include, but will not be limited to:

- length of service of the faculty member at L.C.C.,
- institutional needs and programs priorities,
- budgetary restrictions,
- enrollment needs
- interdisciplinary adaptability.

1. Any areas to be affected by staff reduction will be determined through program review an/or program, departmental or divisional reorganizations.

2. The criteria to be used for program review and program, departmental divisional reorganizations shall include, but not be limited to the following: (the following list does not imply a priority listing)

- affirmative action
- budgetary restrictions
- community needs
- credit hour production
- cost effectiveness
- diversity of personnel
- ease of program delivery
- enrollment trends
- institutional needs and program priorities
- interdisciplinary adaptability
- length of employee service
- personal evaluations/qualifications
- program costs
- ratio of full-time to part-time employees

It is also recognized that this document will not preclude the employee association representatives from making other recommendations regarding personnel reductions at a later time.

To determine the appropriate reduction Gannon directed the deans of LCC's several divisions to conduct program reviews in accord with the agreed upon criteria and to recommend people for possible layoff. Later, Gannon assigned each division a share of the budget deficit to

eliminate by reduction in staff. Gannon also appointed a review committee, of which he was not a member, to assist the dean of the several divisions in applying the recommended criteria in their program reviews and reorganizations.

Sam Kintzer (Kintzer) was Dean of the Division of Arts and Sciences where Arganian and Taylor taught. Kintzer selected only three of the fourteen criteria as most relevant to the Division of Arts and Sciences: (1) enrollment trends, (2) ratio of full-time to part-time faculty, and (3) personal evaluations and qualifications.. Kintzer ranked all the programs in the division by percentage of enrollment decline over the prior three years and the ratio of full-time to part-time faculty. Individual instructors in the programs with the highest full-time to part-time faculty ratios and the greatest decline in enrollment were then ranked in terms of the performance evaluation. The performance evaluations had been conducted for several years and consisted of 60% administrative ratings and 40% student ratings. After applying the three selected criteria Kintzer recommended certain faculty members, including Arganian and Taylor, for layoff. Kintzer also informed the departmental chairpersons of his selections.

The various deans presented their recommendations to Gannon. Gannon did not substitute or alter any recommendations of the deans and forwarded them on to the

Board. The Board approved the layoffs on July 22, 1983, and notified Arganian and Taylor that their full-time teaching positions were eliminated. However, both were offered, and each accepted other part-time teaching positions with LCC.

Several of the laid off faculty members filed grievances under the collective bargaining agreement alleging that LCC's reduction in staff was "arbitrary, capricious and in bad faith." They grieved through arbitration. The arbitrator determined that LCC was subject to a covenant of good faith in determining the existence of a financial exigency and in reducing staff. Further, the arbitrator found not arbitrary and capricious conduct in the staff reductions and further determined that the administration exercised good faith managerial judgment after duly considering all permissibly relevant factors.[6]

Plaintiffs have filed a four count complaint alleging

---

[6] The arbitrator determined that "the arbitrator . . . does not believe that the Board could properly be held to have acted in bad faith here . . . ." (Arbitrator's Decision, 12-13). Rather, the arbitrator decided that "the administration's layoff selections reflected good faith managerial judgments reached after due consideration of all relevant and contractually legitimate factors (including the mutually agreed upon criteria listed in the July 8, 1983 memorandum) and without reliance upon irrelevant or contractually illegitimate factors." Further the arbitrator determined that, even though Taylor had been a MAHE leader and an outspoken critic of LCC and Gannon, there was no " convincing support for the proposition that [Taylor's] 1983 layoff was either wholly or partially a product of . . . discrimination because of union activity." (Arbitrator's Decision, 25).

that Defendants violated 42 U.S.C. sec. 1983 by abridging the First Amendment rights of Taylor, the Due Process rights of Arganian and Taylor, the Michigan Elliott-Larsen Civil Rights Act as to Arganian and Taylor, and the Michigan Wrongful Death Act as to Taylor.

ANALYSIS

The United States Supreme Court has recently reviewed the standards for summary judgment. Celotex Cor. v. Catrett, 477 U.S. 317, 323-325 (1986); Anderson v. Liberty lobby, Inc., 477 U.S. 242, 249-50 (1986); Matsushita Elec. Industrial Co., Ltd., v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). To properly move for summary judgment a party must identify those portion of the filings before the Court indicating an absence of evidence to support an essential element of the opposing party's claim. In Celotex, at 323-325, the Court stated: "[T]he burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." To avoid a summary judgment, the Plaintiff may not merely rely on the allegations in the complaint, but must present significant probative evidence tending to support the allegations in the complaint. In Anderson, at 249-50, the Court stated: "[T]here is not issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.

If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted). In Matsuchita, at 587, the Court stated: "It follows from these settled principles that if the factual context renders respondents' claim implausible . . . respondents must forward with more persuasive evidence to support their claim than would otherwise be necessary."

Plaintiffs claim that in laying off Arganian and Taylor the Defendants violated Arganian's and Taylor's constitutional rights to procedural and substantive due process and Taylor's right to freedom of speech.

A. DUE PROCESS

Due process claims may raise issues of either procedural due process or substantive due process. The right to substantive due process prohibits that state from depriving people of certain fundamental constitutional rights including the incorporated provisions of the Bill of Rights and various nontextual constitutional rights, such as family and privacy rights. It also protects people from state conduct that is arbitrary, egregious, and shocking; apart from whatever procedural safeguards are available. The right to procedural due process requires constitutionally adequate procedural safeguards where the state deprives people of life, liberty, and property.

1. Procedural Due Process

Resolution of procedural due process issues requires two step analysis. The court must first determine whether protected property or liberty interest exists and then determine what procedures are required to protect that interest.

Plaintiffs assert that under the Agreement Arganian and Taylor both maintained constitutionally protected property interests in their continued government employment and that Arganian had an additional basis for a property interest as a tenured employee. Courts recognize legitimate and valid expectations of continued government employment as constitutionally protected property interests. Such rights to continued government employment may arise out of statutes, contracts, or other "explicit understandings" between the employer and employee Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); Board of Educ. v. Loudermill, 470 U.S. 532 (1985).

The Agreement between LCC and MAHE controlled the employment relationship of Arganian and Taylor with LCC. It provided for continuing employment in the nature of tenure with certain procedural safe-guards to insure employees' expectations of continuing employment. Section IX, part A, entitled, "Continuing Contract", provides:

1. Each full-time faculty member shall be issued a continuing contract after three (3) years of satisfactory teaching at the College.

2. In the event a faculty member on a continuing

> contract is not to be offered a contract for following year, he/she will be notified in writing by December 31. He/she will then have recourse to the Grievance procedure starting at Level Two.

However, the Agreement also recognized termination of employment under conditions of just cause, reduction in staff, and non-renewal of a continuing contract.

Arganian also asserts a property interest in his expectation of continued employment as a tenured employee at LCC. Arganian claims that his tenure arose prior to the existence of the Agreement, a collective bargaining agreement and was never extinguished. Arganian asserts he was told that he was a "tenured" employee, that the Agreement did not apply to him, and that when he resigned from administration duties in 1969, he formally indicated that he was returning to his "tenured" teaching professorship.

However, the Agreement provides:

> A. This Agreement shall supersede any rules, regulations, or practices of the Board which shall be contrary to or inconsistent with its terms. It shall likewise supersede any contrary or inconsistent terms contained in any constitutional or by-law provisions of the Association heretofore in effect. All faculty contracts shall be made expressly subject to the terms of this Agreement. The provisions of the Agreement shall be incorporated into and be considered part off the established policies of the Board.
>
> ....

> C. If any provisions of the Agreement or any application of the Agreement to any employee or group of employees shall be found contrary to law, then such provisions or application shall not be deemed valid and subsisting, except to the extent permitted by law, but all other provisions or applications shall continue in full force and effect.

Accordingly, the terms of the Agreement superseded any contrary or inconsistent tenure rights that Arganian possessed. Although a traditional tenure system may not be theoretically "inconsistent" and "contrary" with continuing contract under the Agreement, they are practically "inconsistent". Both systems are job security devices. The Agreement provided that "all faculty contracts shall be made expressly subject to the terms of this Agreement." The Agreement clearly subjected all faculty employment to the terms of "continuing contract". The existence of a separate system of job security protection is inconsistent with the Agreement's intent to subject all faculty contracts to the job security provisions of "continuing contract". After the faculty decided to be represented by MAHE, bargain with the LCC Board, and enter a collective bargaining agreement, the "explicit understanding" of the faculty was embodied in the explicit terms of the Agreement. Thus, Arganian's alleged tenure rights have coalesced into the rights of continuing contract. Cf. JI Case Co. v. National Labor Relations Board, 321 U.S. 332 (1944); Pietrzykowski v. Safie, 1 Mich App 644, 647

(1965), lv. den. 377 Mich 703 (1966); Goetz v. Windsor Central School Dist., 698 F.2d 606, 609 (2nd Cir. 1983). Whatever property rights both Arganian and Taylor possessed in their continued government employment arose under the Agreement.

Assuming that Arganian and Taylor possessed a legitimate expectation of continued government employment under the Agreement, this Court now must determine what due process was constitutionally required to protect that property right. In Matthews v. Eldridge, 424 U.S. 319. 334-335 (1976), the Court identified three factors for evaluating the adequacy of due process in an alleged property or liberty interest deprivation (1) the private interest affected, (2) the risk of an error under existing procedures and the value of alternative procedures, and (3) the government's fiscal and administrative interest in the existing or alternative procedures.

The Agreement controlled the employment relationship between LCC and Arganian and Taylor and also provided procedural safeguards to protect the interests of employees. The Agreement provided for three types of termination: just cause, non-renewal of contract, and reduction in staff. The LCC administration terminated Arganian and Taylor in a purported reduction in staff. Although the Agreement granted LCC the exclusive right to

determine that a reduction in staff was required, it also provided that: (1) the faculty association could present recommendations on the reduction, (2) the administration and faculty association would meet to develop a satisfactory process for reduction, (3) affected employees would receive at least a 45 day notice prior to the effective date of their termination, and (4) affected employees would have recourse to the grievance procedure.[7]

---

[7]. Agreement, Section VI, part X, provides:

1. The Faculty Association recognizes the exclusive right of the Board of Trustee (sic) to determine reductions in personnel and/or operations and the exclusive right to determine the area in which such reductions will be made subject to the provisions contained within this Agreement.

2. During a period of impending layoff, the Board agrees to attempt to accomplish staff reductions by natural attrition (such as resignation, retirement, etc.) and will consider requests for voluntary leaves of absence without pay.

3. Prior to any reduction in staff within the M.A.H.E. unit, the Faculty Association will be provided an opportunity to present recommendations to the President or his/her designated representative(s) and the Board of Trustees regarding such reductions for consideration prior to the final decision.

4. Once it has been determined that a reduction in staff is necessary, representative from the Faculty Association and the Administration will meet in an attempt to develop a mutually satisfactory process of reducing staff. Criteria to be considered prior to a staff reduction may include, but will not be limited to:

-length of service of the faculty member at L.C.C.

Plaintiffs allege that Arganian and Taylor did not receive constitutionally adequate procedural safeguards. Both Arganian and Taylor grieved through binding arbitration. The arbitration decision determined that Arganian and Taylor received all of their rights under the Agreement. It further determined that not evidence existed to support the allegations that LCC arbitrarily or capriciously determined the existence of a financial exigency or selected Arganian and Taylor, or that LCC retaliated against Taylor and Arganian for their criticism of LCC. Upon its review of the pleading, motions, affidavits, and depositions, this Court also determines that no material issue of fact exists as to whether Arganian and Taylor received all on their contractual rights under the grievance procedure.

-institutional needs and program priorities,
-budgetary restrictions,
-enrollment trends,
-interdisciplinary adaptability.

5. Personnel affected by the reduction in staff will be afforded as much notice as possible, but in no event less than forty-five (45) calendar days, prior to the effective date of layoff. Faculty members to be laid off will be informed of existing vacancies for which they may qualify and will be encouraged to apply. The College shall make every effort to place that member in another position within the College for which he/she is qualified.

6. For a period of one year from the effective date of the layoff, no new personnel will be hired to fill the position vacated because of a layoff until after the laid off employee has been offered the opportunity to return to this vacated position.

Even though the Agreement's procedural safeguards were observed, the critical issue is whether the requirements of constitutional due process were observe. Plaintiffs assert that under Loudermill v. Cleveland Board of Eucation, 470 U.S. 532 (1985) LCC was required to provide Arganian and Taylor with a pretermination hearing. Loudermill involved a publicly employed security guard who was fired for failing to disclose a felony conviction on his employment application. The Court in Loudermill, required a pretermination hearing as a "right of reply" properly required in the context of a disciplinary, just cause termination. The purpose of the hearing is not to "definitively resolve the propriety of the discharge." Loudermill, at 545. Rather, the hearing's purpose is limited. "It should be an initial check against mistaken decisions--essentially, determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." Loudermill, 470 U.S. at 545-46. Further, in Loudermill v. Cleveland Board of Education, 844 F.2d 304, 312 (6th Cir. 1988) (on rehearing), the lower Court stated:"Indeed, courts construing the Supreme Court's language in Loudermill have required only the barest of a pretermination procedure, especially when an elaborate post-termination procedure is in place." The purpose and rationale of a Loudermill hearing do not apply properly to a

nondisciplinary reduction in staff executed only after extensive administrative review and replete with grievance procedures.

In the present case the Board notified Arganian and Taylor on July 22, 1983, of their terminations, which would become effective 45 days later. Arganian and Taylor grieved their termination through several levels to binding arbitration. Normally the first level grievance proceeding would have occurred before the effective date of the terminations and satisfied any Loudermill requirement. But Arganian's and Taylor's union representative, Barbara Roberts Mason, requested an extension of the time for filing their grievances. Thus, if a Loudermill, hearing was required before the effective date of the terminations, it was available to Arganian and Taylor, but delayed due to the actions of their union representative. Moreover, both Arganian and Taylor briefly met with Ronald Dove, personnel director of LCC, to discuss matters related to their layoffs before the actual effective date.

After considering the property interests of Arganian and Taylor, the risk of an erroneous determination, and the LCC's interest in efficient administration, this Court determines that Arganian and Taylor received all the constitutional due process required for terminations of governmental employment in the context of a reduction in staff. Arganian

and Taylor had a legitimate expectation of continued governmental employment under the continuing contract provisions of the Agreement. The Agreement provided extensive procedural safeguards to protect this interest against mistaken deprivation. In a reduction in staff situation under the Agreement both the employees' faculty association and collective bargaining unit had extensive predeprivation input into the reduction process. Further, under the Agreement affected employees received notice 45 days before the effective date of termination. Moreover, affected employees had recourse to an extensive grievance procedure that included arbitration. Also, the first level proceeding of the grievance procedure was normally available before the effective date of the termination. The grievance procedure specified in the Agreement satisfied the requirements of constitutional due process to protect the property of public employees who are terminated in a reduction in staff. Cf. Ash v. Board of Education of Woodhaven School District, 699 F.2d 822, 827-28 (6th Cir. 1983); Bignall v. North Idaho College, 538 F.2d 243, 245-46 (9th Cir. 1976); Klein v. Board of Higher Education, 434 F. Supp. 1113, 1118 (S.D.N.Y. 1977); Johnson v. Board of Regents, 377 F. Supp. 227, 236-40 (W.D. Wis. 1974).

In addition to the property interest in continued government employment, plaintiffs also claim that LCC

deprived Arganian and Taylor of their vocational liberty interests without due process. This interest is implicated where the manner of termination "might seriously damage [an employee's] standing and association in the community . . . or impose on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." Board of Regents v. Roth, 408 U.S. 564, 573 (1972). Under Lake Michigan College federation of Teachers v. Lake Michigan Community College, 518 F.2d 1091, 1097-98 (6th Cir. 1975), plaintiffs must demonstrate "that a definite range of opportunities is no longer open to them." Termination alone simply does not abridge this interest.

Plaintiffs claim that Taylor's vocational liberty interest was infringed during Taylor's appearance on a radio talk show on June 5, 1985, almost two years after the terminations when Gannon called in and indicated that Taylor was not a good teacher. Further, plaintiffs argue that David Froh, chairperson of the LCC Board, infringed the vocational liberty interest of both Arganian and Taylor by a comment reported in a local newspaper, that evaluations were weighted more heavily than other criteria to layoff full-time LCC faculty. (Affidavit of Dennis Meier, attached exhibit I-2).

These remarks are simply legally and factually

insufficient to support a claim for deprivation of liberty incident to termination by Taylor. Bishop v. Wood, 426 U.S. 341, 448-49 (1976). Lake Michigan, supra. Plaintiffs have not demonstrated that the LCC administrators laid off Arganian and Taylor in a manner that foreclosed their "freedom to take advantage of other employment opportunities" or "that a definite range of opportunities is no longer open to them." Lake Michigan, at 1098.

2. Substantive Due Process

Arganian and Taylor also assert that their substantive due process rights under the Fourteenth Amendment were abridged in their layoff. In Jeffries v. Turkey run Consolidated School Dist., 492 F.2d 1, 3-4 (7th Cir. 1974). The court defined substantive due process:

> The claim that a person is entitled to "substantive due process" means, as we understand the concept, that state action which deprives him of life, liberty, or property must have a rational basis -- that is to say, the reason for the deprivation may not be so inadequate that the judiciary will characterize it as "arbitrary."

In Brenna v. Southern Colorado State College, 589 F.2d 475, 477 (9th Cir. 1976), the court elaborated on the standards of substantive due process in the context of termination of tenured employees:

> [T]he Fourteenth Amendment does not require that [the college] use any particular selection process, so long as

> the procedure chosen is a reasonable one. The Fourteenth Amendment does not prohibit all state deprivations of property but only those which are effectuated without due process of law. The term "tenure," in the constitutional context, merely provides appellant with a property interest. "Substantive" due process requires only that termination of the interest not be arbitrary, capricious, or without a rational basis.
>
> ...
>
> Appellant argues that... there is an implied condition that non-tenured faculty must be terminated before tenured if there is work which the tenured faculty member is capable of performing....It is enough to note that the interpretation applied by the college's administrative officials in selecting the criteria for deciding which faculty members would be terminated was sufficiently reasonable to put to rest any claim that their decision was arbitrary or capricious.

Challenged governmental conduct violates an individual's right to substantive due process when it is arbitrary, capricious, and without a rational basis.

In the present case Dean Kintzer's unrefuted deposition testimony indicates that he selected Arganian and Taylor for layoff based on the three criteria. The three criteria were: (1) enrollment decline, (2) full-time to part-time faculty ratio, and (3) personal evaluations. Kintzer selected these three as most relevant to his division from the list of criteria that was mutually approved by LCC and the employee bargaining unit representatives, including Taylor for the MAHE.

Plaintiffs allege that the criteria were applied

arbitrarily and capriciously. However, no material issue of fact exists as to whether the three criteria were not applied without a rational basis. Plaintiffs do not appear to factually dispute the accuracy of the departmental enrollment decline or calculation of the full-time to part-time faculty ratios. Plaintiffs do assert that the student evaluation component of the professional evaluation was arbitrary and capricious. But no material issue of fact exists as to whether the use of the personal evaluations had a rational basis. The approved list of 14 criteria included personal evaluations. Further, the student component of the evaluation constituted only 40% of the evaluation. Moreover, the student evaluation component had constituted part of the personal evaluation for several years and originally had been implemented only after consultation and study by the administration and faculty association.

Plaintiffs further argue that a public academic employer must act not only on a rational basis but also in good faith when it terminates tenured faculty in a reduction in staff during a financial exigency. Krotkoff v. Goucher College, 585 F.2d 675 (4th Cir. 1978); Lewitt v. Board of Trustees of Nebraska State College, 376 F. Supp. 945 (Neb. 1974). A danger exists that unscrupulous administrators under the guise and pretext of an economic layoff disingenuously could terminate unwanted "unpopular or

controversial or misunderstood" tenured employees who could not be discharged otherwise except for cause. In Browzin v. Catholic University of America, 527 F.2d 843 (D.C. Cir. 1975).

In determining the presence of good faith, the court in American Association of University Professors, Bloomfield College Chapter v. Bloomfield College, 136 N.J. Super. 442, 346 A.2d 615, 618 (1975), identified the crucial issue as whether the "purported action was in good faith related to a condition of financial exigency within the institution." The Krotkoff court further suggested that the "existence of financial exigency should be determined by the adequacy of a college's operating funds rather than its capital assets." Krotkoff, at 681.

Defendants have extensively supported their motion with documents and affidavits, relying primarily on the affidavit of Bruce Newman, the Business Manager of LCC, delineating the basis of the financial exigency confronting LCC prior to the disputed terminations. In March 1983 the pending deficit facing LCC for fiscal year 1983-84 was $1,674,000. Plaintiffs do not appear to factually challenge the existence of a budget deficit of that magnitude. Rather, plaintiffs simply seem to ignore the factual basis of the deficit and argue:

> In spite of the deluge of financial data the defendants have presented to the court, there is only one figure that is relevant, that is, the final amount of money the college needed to prevent termination of faculty. Factually, LCC is claiming that it need[ed] to terminate tenured faculty contracts because of a budget short fall of $343,270 [affidavit of Bruce Newman, page 11, paragraph 44]. This amount is out of a budget of 30.75 million, and represents less than 1% of the total proposed resource target budget.

(Plaintiffs' Brief in Opposition to Defendants Motion for Summary judgment, at 41.) Plaintiffs are mistaken. All of the figures are relevant in determining the good faith of defendants' assertion that a financial exigency existed. Plaintiffs's focus on the figure of $343,270, ignores the extensive remedial financial measures taken by LCC. No factual dispute appears as to whether initially a pending budget deficit of $1,674,000 existed prior to the disputed terminations. Further, this Court notes that the Agreement granted LCC the exclusive right to determine reductions in personnel. Accordingly, this Court concludes that no issue of material fact ixists (sic) as to whether LCC acted fully within its rights under the agreement by reducing staff in response to an actual financial exigency.

This Court determines that plaintiffs' due process claims, both procedural and substantive, cannot survive defendants' motion for summary judgment. Specifically, this Court finds that both Arganian's and Taylor's property

interests in continued governmental employment at LCC arose out of the collective bargaining agreement between LCC and MAHE. Further, this Court finds that Arganian and Taylor received constitutionally adequate due process under the Agreement's provisions for reductions in staff. Moreover, this Court finds that the selection method for termination had a rational basis and that the determination of a financial exigency did not violate the substantive due process rights of Arganian and Taylor. Accordingly, this Court grants summary judgment as to Count I of plaintiffs' Complaint alleging violation of Arganian's and Taylor's due process rights.

B. FIRST AMENDMENT

Plaintiffs allege that defendants abridged Taylor's First Amendment rights claiming that Taylor was laid off because of Taylor's criticism of Gannon and Taylor's union activity in behalf of MAHE. Specifically, plaintiffs allege that Gannon "designated" Taylor for termination (Complaint, paragraphs 75, 76, 77).

Claims of adverse employment decisions in retaliation for exercise of First Amendment rights are evaluated under a three step analysis. First, plaintiffs must demonstrate that Taylor's activity was constitutionally protected. Second, plaintiffs must show that the protected activity was a substantial or motivating factor in the adverse determina-

tion. Third, if plaintiff establishes the first two elements, then the burden of proof shifts to the defendant employer who must prove that adverse decision would have occurred even absent the protected conduct. Connick v. Myers, 461 U.S. 138 (1983); Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979); Mt. Healthy City School district Board of Education v. Doyle, 429 U.S. 274 (1977); Pickering v. Board of Education, 391 U.S. 563 (1968); Garvie v. Jackson, 845 F.2d 647 (6th Cir. 1988); Ratliff v. Wellington Exempted Village School Board of Education, 820 F.2d 792 (6th Cir. 1987); Stern v. Shouldice, 706 F.2d 742 (6th Cir. 1983); Reichert v. Droud, 701 F.2d 1168 (6th Cir. 1983); Hildebrand v. Board of Trustees of Michigan State University, 662 F.2d 439 (1981); Anderson v. Evans, 660 F.2d 153 (1981); Columbus Education Association v. Columbus School District, 623 F.2d 1155 (1980). Courts have further analyzed the threshold element of demonstrating the existence of constitutionally protected conduct. In both Pickering and Connick the Court determined that generally no constitutional protection is available if the employee has spoken on only "matters of personal interest." However, if the public employee has spoken as a citizen on "matters of public concern" then the court must balance the competing interests of the public employee as a citizen commenting on matters of public concern and of the public employer in

promoting institutional efficiency.

Plaintiffs allege that Taylor criticized the practices and policies of Gammon and LCC as a concerned citizen and a union official, commenting on matters of both public and union concern. This Court will assume that plaintiffs have established that Taylor's conduct was constitutionally protected, without any further balancing of the competing interests. Connick, Pickering, Columbus Education Association, supra, at 1160; Hickman v. Valley Local School District, 619 F.2d 606, at 609 (6th Cir. 1980). However, this Court cannot similarly assume that the protected conduct was a substantial or motivating factor for the adverse action.

Defendants assert that no evidence exists indicating that Gannon had any part in selecting Taylor for termination. Further, defendants contend that Gannon was isolated from the selection process by a four person review team and that Kintzer alone made the recommendation to terminate Taylor based solely on criteria which Taylor had himself agreed to on behalf of MAHE in the July 8, 1983, memorandum. In response, plaintiffs present affidavits and deposition testimony generally indicating that Gannon was vindictive and did not like either Taylor or the unions at

LCC, and that Taylor was also an outspoken (sic) of Gannon.[8]

---

[8] For example, by way of response, plaintiffs argue at pp. 61 ff. of their brief in opposition to defendants' motion for summary judgment:

> Raymond Riskey testified by way of Discovery deposition. When asked if he had any knowledge that President Gannon directed that Plaintiffs be laid off he answered: "I am assuming that he did." (Riskey Dep. p. 9). He further answered as follows: I think that those people were, along with perhaps having higher salaries, I think a number of them were not well liked by President Gannon." (Riskey Dep. p. 10) When asked whether he considered Ed Taylor an outspoken critic of President Gannon and the Board of Trustees' policies, Riskey responded: "I would say that would be an accurate, but mild description, but yes, he was an outspoken critic." When asked to knowledge in the history of Lansing Community College had there been a more outspoken critic of President Gannon and the Board of Trustees than Ed Taylor, Riskey responded: "At this point I would have to say no, but I am fast approaching that myself" (Riskey Dep. p. 21).
>
> Further, when asked his opinion as to whether or not Edward Taylor was laid off or terminated from L.C.C. because he was Union President or for his Union activities, Riskey responded: "I believe he was. I believe that he said things, did things, that angered the President. I think that he was not well liked by Dean Kintzer. I think being Union President and being laid off, terminated, would be a pay back for the Union having been on strike in 1978, and Edward was very active, as I remember, during that strike." (Riskey Dep. p.22) When asked why he believed the lay-off of Ed Taylor in 1983 was a pay back for something that happened in 1978, Riskey responded: "My perception is that President Gannon doesn't forget when people cross him and say things he doesn't like, are critical of him, that he has got a long memory." When asked how he would classify the relationship between Philip Gannon and Edward Taylor prior to the lay-off, Riskey responded: "Very adversarial, a lot of hostility." (Riskey Dep.

Whatever else such testimony does, it does not constitute probative evidence that Gannon "designated" and "selected" Taylor for termination because of Taylor's union activity and his outspoken criticism of Gannon. After a through review of the pleading, affidavits, and other documents in the record, this Court determines that no issue of material fact exists as to whether Gannon did not designate Taylor for termination because of Taylor's union activity and

---

p. 23) When asked if he has witnessed any hostility by Philip Gannon either against Ed Taylor or the Union, Riskey responded: "Hostility takes many forms. . . . It is my perception that the Social Science Department has suffered over the years because we have had so many Union leaders, the difficulty in obtaining replacements for positions, of getting new positions, of, as it appears to me, having to fight harder for it, for everything that came easier for departments that were not nearly as outspoken. I attribute a lot of that in terms of --I see that as hostility directed at MAHE in a sense, because so many leaders have come from that department." (Riskey Dep. 23) When asked how he would characterize Philip Gannon's leadership, Riskey responded: "I have been quoted in newspapers within the last few months as saying that he has ruled L.C.C. with an iron fist, very authoritative, authority oriented, hard, and I think that image of the iron fist is how I would see him. So I would put him at that very aggressive end of the continuum in terms of the leadership. When he see something that he wants he goes for it, and anything that gets in the way is too bad." (Riskey Dep. p. 25)

Although this type of deposition testimony may be good dramatic speculation, it is not particularly probative evidence that Gannon actually designated Taylor for termination because of Taylor's union activity and Taylor's outspoken criticism of Gannon personally.

criticism of Gannon. Accordingly, this Court grants summary judgment as to Count II of plaintiffs' complaint alleging violation of Taylor's First Amendment rights.

C. PENDENT CLAIMS

Both claims under the Michigan Wrongful Death Act and the Michigan Elliott-Larsen Civil Rights are pendent state claims. Since this Court has determined to grant defendant's motion for summary judgment as to the sec. 1983 claims in counts I and II, this Court dismisses both pendent state claims.

D. QUALIFIED IMMUNITY

Defendants assert that they are immune from suit under the holding of the Court in Harlow v. Fitzgerald, 457 U.S. 800 (1978), that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory of constitutional rights of which a reasonable person would have known." See Procunier v. Navarette, 434 U.S. 555 (1978). In the context of summary judgments, the court in Poe v. Haydon, 853 F.2d 418 (6th Cir. 1988), stated:

> If the undisputed facts show that defendant's conduct, as a matter of law, did not violate clearly established legal rights, then the district court must grant the defendant summary judgment on the basis of qualified immunity. . . .Thus, for example, the defendant is entitled to summary judgment if discovery fails to

> uncover evidence sufficient to create a genuine issue as to the truth of the allegations that the defendant in fact committed acts that violate clearly established law.

Poe, at 425. In remanding the case before it, the Poe court provided the lower court a standard:

> [W]hether based on all the undisputed evidence before the court, a reasonable official in the position of each [defendant] could have believed his or her conduct to be lawful, considering the state of the law when he or she took the challenged action.

In the present case the reduction in staff was a discretionary function within the scope of the defendants' authority under the terms of the Agreement. This Court's preceding analysis determined that plaintiffs failed to present sufficient probative evidence supporting the truth of their allegations that defendants violated Arganian's and Taylor's due process and First Amendment rights in laying them off. Reasonable officials in the positions of defendants could have believed their conduct to be lawful in laying off Arganian and Taylor under the reduction in staff provisions of the Agreement utilizing the list of criteria mutually approved by the unions and administration.

CONCLUSION

In accordance with the preceding analysis, this Court grants defendants' motion for summary judgment on Counts I and II of plaintiffs' Complaint and dismisses Counts III and IV for lack of jurisdiction. Additionally, this Court grants

defendants summary judgment as to Counts I and II on the basis of qualified immunity.

Dated: April 24, 1989

S/_____
HON. ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SALLIE ELIZABETH JOHNSTON-TAYLOR, individually and as Administratrix of the Estate of Edward Taylor, BRINTON SCOTT and KIMBERLY TAYLOR, individually, and DAVID and LILLIAN ARGANIAN, individually

Plaintiffs,

V.

G86-661-CA5
HON. ROBERT HOLMES BELL

PHILIP J. GANNON, individually and as President of Lansing Community college (sic), and the BOARD OF TRUSTEES OF LANSING COMMUNITY COLLEGE, individually, jointly, and severally,

Defendants.

JUDGMENT

In accordance with the preceding analysis, this Court grants defendants' motion for summary judgment on Counts I and II of plaintiffs' Complaint and dismisses Counts III and IV for lack of jurisdiction. Additionally, this Court rants defendants summary judgment as to Courts I and II on the basis of qualified immunity.

Dated: April 24, 1989

S/
HON. ROBERT HOLMES BELL
UNITED STATE DISTRICT COURT JUDGE